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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 309

ASA RAY FRENCH AND GLENDA BEATRICE FRENCH,

Petitioners,

vs.

DONALD LINLEY FRENCH, A MINOR, BY MILDRED B. FRENCH, HIS MOTHER AND NEXT FRIEND,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

We will not burden this Court with an extended reply to Respondent's Brief in opposition to Petitioner's Application for Writ of Certiorari. We desire, however, to point out the following matters:

Respondent raises the questions (Respondent's brief 1, 6, 7,):

> (1) Whether or not the record shows the issues raised by Petitioners were specially and specifically set up at the proper time and in the proper manner for decision by the Kansas Supreme Court.
>
> (2) Were such issues necessary to that Court's decision,
> and
>
> (3) Were such issues actually determined thereby.

In this connection, we point out that the Certificate of the trial Judge shows that this issue was raised at the trial of this case. Further, the briefs filed in the court below of both Petitioner and Respondent show that this issue was again raised before and at the time this case was before the Supreme Court of Kansas. The motion for Rehearing (R. 30 to 32) also raised such issue. Therefore, the issue as to the applicability of the pertinent Federal Statute (the Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609 as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195, U. S. C. A., Title 38, Section 454a) was raised by these Petitioners at the outset of these proceedings, on appeal, and on motion for rehearing.

Counsel for Respondent assert (Respondent's brief, P. 8) that the certificate of the trial judge can avail Petitioners nothing, and cite the case of *Honeyman* v. *Hanan*, 300 U. S. 14, 81 L. Ed. 476, 57 Sup. Ct. Rep. 350, 1937, appeal dismissed 302 U. S. 375, 82 L. Ed. 312, in support thereof. A careful reading of the *Honeyman Case*, (*Supra*, 300 U. S. l. c. 22) reveals that this Court had the following to say relative to such Certificates:

> "Thus the true function of a certificate or statement of a state court, by way of amendment of, or addition to, the record, is to aid in the understanding of the record, to clarify it by defining the federal question with reasonable precision and by showing how the question was raised and decided, so that this Court upon the record *as thus clarified* may be able to see that the federal question was properly raised and was necessarily determined." (Italics supplied).

Petitioners in their answer to Respondent's petition, filed with the trial Court, alleged that any such agreement was void, illegal and of no effect. Petitioners were not required, under the laws of Kansas pertaining to civil procedure, to plead in their answer, the Federal Statute (the Act of

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August 12, 1935, Chapter 510, Section 3, 49 Stat. 609 as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195, U.S.C.A., Title 38, Section 454a) prohibiting the assignment of the proceeds of United States Government Life Insurance. The General Statutes of Kansas, 1935, 60-750, provide: "Neither presumption of Law nor matters of which judicial notice is taken need be stated in the pleading." If the Petitioners had pleaded specifically that the agreement alleged by Respondent was void, illegal and of no effect because of the pertinent Federal Statute, and pleaded the Federal Statute verbatim, such pleading would merely have been a presumption of law on the part of Petitioners, and a matter of which the Supreme Court of Kansas must, in the absence of such pleading, take judicial notice of. The rule is correctly stated in 41 American Jurisprudence at page 294 as follows:

> "It is a universally recognized rule that the courts of a state take judicial notice of its own public statutes or the general laws of Congress, and it is accordingly unnecessary to plead the public statutes of the state in which the action is brought, or, in an action in either a state or Federal court, to plead the laws of the United States, setting out either the contents or the substance thereof. When the existence or the contents of such laws are called in question, the court must necessarily decide the question the same as it decides any other question of law."

Therefore, Petitioners respectfully contend and show to the Court that they raised the Federal question in a proper manner, in that at the trial of this case, Petitioners stood on a demurrer to the evidence, and in support of their contention, argued that any such agreement was void, illegal and of no effect because prohibited by the pertinent Federal Statute, (the Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609 as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195, U.S.C.A., Title 38, Section 454a). This was the proper manner in which to raise their

rights under this Federal Statute at the outset. Petitioners inquire of Counsel for Respondent by what other procedure could the Federal question be shown to the Trial Court?

Under such circumstances the Certificate of the Trial Court should properly be considered by this Court to determine if the Federal Statute was properly raised, and that Petitioner's rights under such Statute were therefore necessarily adversely determined to Petitioners.

In addition, this Federal question was raised on appeal by your Petitioners, as is shown by reference to our "Motion for Rehearing," under the caption "Argument" (R. 31) wherein your Petitioners *again* pointed out to the Supreme Court of Kansas that such Court did not refer to, in their decision, the pertinent Federal Statute or the case of *Bradley* v. *United States,* 143 Federal (2nd) 573, although these Petitioners had, in fact, devoted more than three pages in their brief on appeal to the Supreme Court of Kansas, to a discussion of the *Bradley* case, *supra.* Further, Respondents have in their Brief filed with the Supreme Court of Kansas, devoted more than a page to the discussion of the *Bradley* case, *supra.*

Petitioners cannot escape the belief, therefore, that Counsel for Respondent does not seriously contend the point made by them that the record here fails to show that a Federal question was presented to the Court below. The multitude of cases cited by Counsel for Respondent cover instances wherein a Federal Question *was not raised* in the Court prior to the decision of such Court. However, the facts here do not justify the application of those cases. The record in this case *refutes* any possible contention by Counsel for Respondent that a Federal Question was not stated and raised in the Court below. The record is replete with evidence that the Federal Statute in question was raised in both the trial Court and later in the Supreme

Court of Kansas on appeal. When the brief of petitioners filed with the Supreme Court of Kansas, devotes three pages to a discussion of the *Bradley* case *supra*, and the brief of Respondent contains more than one page of a discussion of the *Bradley* case, how can respondent *now* contend that the Supreme Court of Kansas did not have before it for determination the Federal Question? We again call this Court's attention to the record in Petitioner's "Motion for Rehearing" filed with the Supreme Court of Kansas under the caption "Argument" (R. 31) wherein Petitioners *again* pointed out to the Supreme Court of Kansas that such Court did not refer to the pertinent Federal Statute or the *Bradley* case, *supra*, although both Respondent and Petitioners had covered the Federal Question in their Briefs submitted to the Supreme Court of Kansas.

Therefore, your Petitioners submit that the record shows the Federal question was urged by them in the trial Court, on appeal, and also in their Motion for Rehearing. Petitioners, therefore, urged and relied on the Federal Statute and the decision of the *Bradley* case, *supra*, throughout every proceeding in this case, and Petitioners submit that the certificate of the trial judge makes clear the fact, if it were otherwise doubtful, that rights under the Federal Statute (The Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609 as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195, U. S. C. A., Title 38, Section 454a) were relied upon and passed upon in the Courts below. See *Rector* v. *City Deposit Bank Company*, 200 U. S. 405, 26 Supreme Court Reports 289, 50 L. Ed. 527, and cases cited.

In addition, the contention of the Respondent that the record shows no Federal question might also be disposed of by reason of the additional fact that the action was brought to recover the proceeds of the Insured's United States Gov-

ernment Life Insurance Policy and the Petition of Respondent repeatedly refers to United States Government Life Insurance, and that the proceeds of such insurance had been paid to Petitioners by the Government of the United States, which on its face, would be controlled by the laws of the United States and this itself, therefore, presents a Federal question of substance.

Passing on to the question of whether or not such an agreement as alleged by Respondent is an invalid assignment, prohibited by the Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609 as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195, U. S. C. A., Title 38, Section 454a, Petitioners submit that this Statute refers to assignments by the insured as well as to assignments by the named beneficiaries. Indeed, if the Congress of the United States had intended to make such a restriction, they would have so stated in such law.

Attention is invited to page 18 of Respondent's brief wherein counsel for Respondent states, "The insured may at any time, change the designation of the beneficiary so as to "assign" the "benefits" to any person of his choosing——".

The Court's attention is also invited to page 24 of Respondent's brief wherein Counsel for Respondent states, "As a matter of fact, the case at bar might, despite *Bradley* v. *United States, supra,* have been based quite properly upon the theory that the contract between the insured and Petitioners effected a change of beneficiaries under the policy."

On page 13 of Respondent's brief in the Supreme Court of Kansas, Counsel for Respondent stated, "The Appellee (Respondent) makes no claim that there has been a change of beneficiary. Appellants (Petitioners herein) in their brief cited the case of *Bradley* v. *United States,* but we say

that it is not a case in point, for it merely holds that the Veterans Administration, a governmental agency, which administers the National Service Life Insurance Act, will not pay the proceeds of insurance to anyone but the named beneficiary."

Just what Counsel for Respondent means to be claiming is, to say the least, not clear. They assert one thing in the Supreme Court of Kansas and in this Court assert the opposite. It is now the apparent position of Counsel for respondent, that the purported agreement alleged to have been made by and between Petitioners and the insured, results in a change in the beneficiary of the policy of insurance. This is manifest from an examination of pages 24 and 25 of Respondent's brief. Such position on the part of Counsel for Respondent results in a complete about-face from their former position taken in the Supreme Court of Kansas, where they made the contention that the *Bradley* case, *supra,* was inapplicable to a decision by that Court. There Counsel for Respondent stated, as heretofore pointed out, as follows, "The appellee makes no claim that there has been a change of beneficiary." We cannot escape from inquiring *just what do the gentlemen mean?* First they contend in the Supreme Court of Kansas that there has been no change of beneficiary, and now in this Court they say there has been a change of beneficiary. Either their position before the Supreme Court of Kansas was unsound, or their position now taken in this Court is unsound. They cannot be right in both instances.

Petitioners submit to this Court one issue to decide, which issue has been consistently urged by them throughout all the proceedings of this case, *i.e.,* the alleged agreement on the part of Petitioners to assign the proceeds, made prior to the death of the insured, cannot be enforced by Respondent, either before or after the receipt of the proceeds by the

named beneficiaries, Petitioners herein, for the reason that any such agreement is illegal, void and of no effect, because prohibited by the pertinent Federal Statute, the Act of August 12, 1935, Chapter 510, Section 3, 49 Stat., 609 as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195, U. S. C. A., Title 38, Section 454a. If an oral Assignment of the proceeds would not have been recognized by the Veterans Administration, and such agency was required by law to pay the proceeds to the named beneficiaries, then such oral assignment is still invalid after the proceeds have been paid to the named beneficiaries. Therefore, Respondent has no right of action against such named beneficiaries after the proceeds have been paid to them. To allow the same to be done, is to let the Respondent do indirectly what he cannot do directly.

Petitioners submit that an assignment of proceeds, as distinguished from a change of beneficiary, is exactly what is prohibited by the Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609 as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195, U. S. C. A., Title 38, Section 454a. Indeed, if the insured desired to *change the beneficiary*, he was required to follow the proper method required by Federal law to effect a change in beneficiary. The insured was specifically authorized, under the Federal law pertaining to the naming of beneficiaries of a United States Government Life Insurance policy, to designate his parents, Petitioners herein, as the beneficiaries of his insurance, 43 Stat. 624 as amended, 38 U. S. C. A., Section 511. The Insured had the right to change the beneficiary if, and only if, he complied with pertinent Federal law. The pertinent Federal law, 46 Stat. 1016, 38 U. S. C. A., Section 426, gives the Administrator of Veterans affairs, the right and duty to promulgate regulations as to how a change of beneficiaries shall be effected. A change of beneficiaries,

to be valid and effective, is subject to and must be done in accordance with such regulations, and any such change of beneficiary can only be to another beneficiary who is within the class of beneficiaries allowed by law, 43 Stat. 624 as amended, 38 U. S. C. A., 512. The pertinent regulation of the Adminstrator of Veterans affairs is as follows:

> "Regulation 3060, Regulations and Procedure, Veterans Administration, Washington, D. C." "Change of Beneficiary. The insured under United States Government Life Insurance shall have the right at any time, and from time to time and without the consent or knowledge of the beneficiary, to change the beneficiary. *A change of beneficiary must be made by written notice to the Veterans' Administration over the signature of the Insured and shall not be binding on the United States unless received and indorsed on the policy by the Veterans' Administration. A change of beneficiary must be forwarded to the Veterans' Administration by the insured or his agent and must be accompanied by the policy.* A change of beneficiary may be indorsed during the lifetime of the insured or after his death, and when so indorsed said change shall be effective as of the date the insured signed the written notice of change of beneficiary. The United States shall be protected in all payments made to the beneficiary last of record and before receipt of notice of a change of beneficiary, and no payments so made shall be paid again to the changed beneficiary. The insured may exercise any right or privilege given under the provisions of a United States Government Life Insurance policy without the consent of the beneficiary. An original designation of a beneficiary may be made by the last will and testament, but no change of beneficiary may be made by the last will and testament." (Italics supplied)

Indeed, the Respondent was not even in the proper class of beneficiaries at the time the alleged assignment was made, as Respondent was still an unborn child, not *in esse*, and

therefore not even without the permitted class of beneficiaries designated by the appropriate Federal Statute, 38 U. S. C. A. Section 511, 43 Statute 624, as amended, therefore, the insured, Donald Ray French, could not have designated Respondent, an unborn child at the time the alleged promise or assignment was made, for, as he was unborn and not *in esse,* he was not within the permitted class of beneficiaries, and, even assuming that a trust or assignment was created by the alleged promise of Petitioners such promise would still have been void under the Federal Statute, 38 U. S. C. A. Section 511, limiting the persons who can be named beneficiaries. Petitioners heartily agree with page 19 of Respondent's brief, wherein they quote from American Law of Veterans (Kimborough and Glen, 1946) as follows:

> "Trusts in Insurance Proceeds.—The National Service Life Insurance Act is silent with respect to the right of an insured to ingraft a trust upon the insurance proceeds. In the face of a similar omission in the War Risk Insurance Act the courts held that a trust created by the insured would be enforced—A trust thus created is revocable. *Affirmance of the right to establish a trust in insurance proceeds does not mean that an insured can go outside the permitted class of beneficiaries and establish a trust in their favor, since to do so would be an evasion of the statutory provisions limiting the class of persons entitled to receive insurance proceeds.*" (Section 522, p. 396)

Petitioners submit that an assignment, trust, or contract for the benefit of a third person, as is herein claimed by Respondent, if made in favor of an unborn child, not *in esse,* that such unborn child was not within the permitted class of beneficiaries, and that the judgment of the Supreme Court of Kansas enforces an assignment, a trust, or a contract for the benefit of third persons, when such assignee,

cestui que trust or third person was not within the permitted class of beneficiaries permitted by the statute, 38 U. S. C. A. Section 511, 43 Stat. 624, as amended, and that if the judgment of the Supreme Court of Kansas is allowed to stand, such judgment would be an evasion of the statutory provisions limiting the class of persons entitled to receive the proceeds.

Petitioners also call attention to the Court that the cases cited by Respondent, starting a the bottom of page 20 of Respondent's brief to the end thereof, are all cases arising long before the enactment of the pertinent Federal Statute (Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609, as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195, U. S. C. A., Title 38, Section 454a).

Indeed, such act was probably enacted to prevent outsiders from contravening the wishes of insured veterans by claiming oral assignments or trusts in the proceeds of Government Life Insurance, and therefore the Congress made the proceeds unassignable.

In conclusion, we submit that the instant case presents Federal Questions of substance and of National importance which have not yet been decided by this Court. Petitioners throughout the entire proceedings of this case have contended the purported assignment to be in violation of Federal Statute. The question was raised in the Trial Court, in the Supreme Court of Kansas on appeal and on motion for Rehearing and was by such Court determined adversely to these Petitioners. The approximately fifteen million veterans of these United States who have taken out and now carry either United States Government or National Service Life Insurance are entitled to a pronouncement by this Court on such vital issues which affect their rights, and the rights of their named beneficiaries. We respectfully

urge that under such circumstances it is the plain duty of this Court to grant the Writ, so that these petitioners and others in like circumstances who may be adversely affected by alleged oral assignments of the proceeds of such insurance, may know of the protection afforded them by the Federal Statute which prohibit assignments of the proceeds of either United States Government or National Service Life Insurance.

Respectfully submitted,

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